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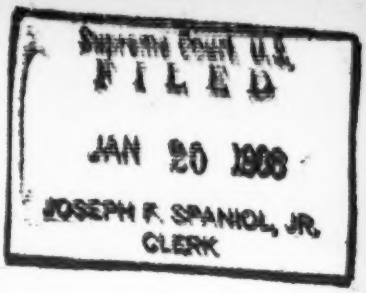

NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

* * * * * * * * * * * * * *

BERNETTA HILBUN
Petitioner

V.

DAVID J. GOLDBERG
Respondent

* * * * * * * * * * * * * *

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Does a federal court, interpreting a state limitation of action statute in a diversity case, violate the Erie Doctrine by refusing to adhere to a legislatively assigned definition of a statutory term, when use of the state law definition of the term in construing the statute would not contravene any Federal Rule of Civil Procedure or any other federal law?

2. Does a federal court in a diversity case violate the Erie Doctrine by expanding the scope of a state limitation of action statute by analogy when that state's Supreme Court has expressly condemned such action?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO:

BERNETTA HILBUN

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* * * * * * * * * * * * * * * * *

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

* * * * * * * * * * * * * * * * *

Petitioner, Bernetta Hilbun ("Hilbun"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 823 F.2d 881, and is reprinted in the appendix to this petition at Pet.App A.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1987. A Petition for Rehearing before the panel was denied on October 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

LAWS INVOLVED

1. The Rules of Decision Act, 28 U.S.C. Sec. 1652, is set forth in the appendix to this petition at Pet. App. B.

2. F.R.C.P 41(b) is set forth in the appendix to this petition at Pet. App. C.

3. LSA-C.C.P. Art. 3463 is set forth in the appendix to this petition at Pet. App. D.

4. LSA-C.C.P. Art. 561 is set forth in the appendix to this petition at Pet. App. E.

5. LSA-C.C.Art. 3457 is set forth in the appendix to this petition at Pet. App. F.

STATEMENT

In July, 1984, the petitioner filed a complaint against the respondent in the United States District Court for the Eastern District of Louisiana. The complaint sought damages against the respondent arising out of the conversion of the petitioner's property. The petitioner was unable to serve the respondent with process. Consequently, on March 27, 1985, the district court dismissed the suit without prejudice for failure to prosecute under Fed. R. Civ. P. 41(b).

On May 8, 1985, the petitioner filed a second complaint against the respondent in the district court claiming damages for conversion. The basis for jurisdiction of this second complaint, like the first one, was diversity of citizenship pursuant to

28 U.S.C. 1332.

The acts of conversion referred to in those complaints were completed at an auction held on March 23, 1984. Under Louisiana law, the prescriptive period for bringing a damage action for conversion is one year. Thus, it was necessary to file suit not later than March 23, 1985, to interrupt prescription on the claim.

The respondent filed a motion to dismiss the second complaint on the basis of prescription. The respondent claimed that the first complaint had not interrupted prescription because it had been dismissed for failure to prosecute. The district court denied the motion to dismiss, but reserved for the respondent the right to raise the defense at the trial of the case.

The respondent did not raise the

defense of prescription at the trial. As a result, no evidence was presented by either respondent or petitioner concerning that issue.

The district court entered a judgment on the merits in favor of the petitioner for the sum of $19,000.00 after a trial by jury.

The respondent filed a motion for new trial on several grounds, including prescription. The district court denied the motion for new trial, and found that the respondent had waived the defense of prescription by not raising it at the trial.

The respondent appealed from the judgment of the district court. In an opinion rendered on August 10, 1987, the United States Court of Appeal for the Fifth Circuit reversed the district court's judgment on the basis of the

prescription defense.

The court of appeal's opinion found that the filing of the first complaint did not interrupt prescription. The opinion held that the dismissal of the first complaint pursuant to Fed. R. Civ. P. 41(b) constituted "abandonment" under La. Civil Code Article 3463. The court of appeal observed that, according to La. Civil Code Article 3463, the interruption of prescription resulting from the filing of a suit is considered never to have occurred if the plaintiff "abandons" the suit. The opinion acknowledged that state law defines abandonment of an action in La. C.C.P. Art. 561 as follows: "An action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of five years." However, the court of appeal

rejected the constraints of that definition of abandonment; and held that a dismissal under Fed. R. Civ. P. 41(b) for failure to prosecute is analogous to abandonment.

In making this analogy, the court of appeals was aware that it was hurdling over the fact that La. Civil Code Article 3463 deals directly with the subject of "failure to prosecute". The opinion recognized that La. Civil Code Article 3463 provides for an annulment of the interruption of prescription when the plaintiff "fails to prosecute the suit at the trial." The petitioner's first complaint was not dismissed for failure to prosecute "at the trial". Thus, the court could not fit the circumstances of this case within the ambit of La. Civil Code Article 3463 unless the term abandonment was defined broadly enough to include

dismissals for failure to prosecute other than "at the trial". However, the opinion made no attempt to reconcile the apparent inconsistency between the law's limiting clause concerning failure to prosecute "at the trial" and the court's analogy equating abandonment with failure to prosecute generally.

The court of appeals acknowledged that it was rejecting the petitioner's suggestion that La. Civil Code Article 3463 should be read narrowly to provide for annulment of interruption of prescription only under its enumerated conditions.

The Supreme Court of Louisiana has held that prescription is stricti juris and that the statutes on the subject cannot be extended to analogous cases beyond the strict letter of the law.

Interestingly, the Supreme Court of Louisiana's most recent statement of that principle of rejecting the extension of the scope of prescription statutes by analogy was made in response to a certified question submitted by the United States Court of Appeals for the Fifth Circuit in Duer & Taylor v. Blanchard, Walker, O'Quin & Roberts, 354 So.2d 192 (La.1978), on certification from 558 F.2d 328 (5th Cir. 1977).

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit is in direct conflict with the Rules of Decision Act (28 U.S.C. 1652) and the Erie Doctrine. The court's opinion refused to apply a legislatively assigned definition to a statutory term in construing a state

limitation of action statute. Furthermore, the court extended by analogy the application of a state limitation of action statute when both the highest court and the legislature of that state have explicitly condemned such statutory construction. In the absence of a Federal Rule of Civil Procedure or some other federal law requiring such a departure from state law, the court of appeals' decision is clearly erroneous.

The court of appeals implicitly suggests that its departure from state law is necessary to further the purposes of Fed.R.Civ.P. 41(b). However, the opinion never identifies how adherence to state law in this case would abridge Fed.R.Civ.P. 41(b).

The court of appeals declares in its opinion that the federal courts have not

heretofore ruled on the precise question raised by this case. This declaration by the court is true; yet there are legions of federal decisions under the Erie Doctrine and the Rules of Decision Act which underscore a federal court's obligation in a diversity case to apply state law as the rule of decision in the same manner as would the highest of the state. The decision of the court of appeals in this case has failed to meet that obligation.

1. THE ERIE DOCTRINE, AND THE RULES OF DECISION ACT (28 U.S.C. 1652), PROHIBIT A FEDERAL COURT IN A DIVERSITY CASE FROM SUPPLANTING A LEGISLATIVELY ASSIGNED DEFINITION OF A TERM APPEARING IN A STATE STATUTE WITH A DIFFERENT DEFINITION OF ITS OWN CHOOSING.

The court of appeal has no authority to disregard the state statutory definition of the term "abandonment" in applying La. Civil Code Article 3463 to the facts of this case. The Rules of Decision Act (28 U.S.C. 1652), as amplified by the Erie Doctrine, obligates the court of appeal to follow state law as it exists; and does not permit any deviation therefrom "except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide". 28 U.S.C. 1652. In this case, the court of appeal's refusal to adhere to the state legislative definition of "abandonment" was not necessary to comply with, or to further the ends of, any federal law or policy. Consequently, the court of appeal's derogation from that state law should be

reversed.

The court of appeals suggests that it is not constrained by Louisiana's statutory definition of "abandonment" because "federal courts are priviledged to establish their own procedural rules for control of their dockets for actions heard in diversity." 823 F.2d 881, at P.884 (See Pet. App. 11a). However, the opinion offers absolutely no explanation of how the federal court's power to dismiss an action for failure to prosecute pursuant to Fed.R.Civ.P.41(b) is affected or abridged by applying the state statutory definition of "abandonment" to La. Civil Code Art. 3463. In fact, no such conflict exists. Applying the state law definition of abandonment to La. Civil Code Art. 3463 still enables a federal court to exercise its power to dismiss an action for failure to prosecute. If the court of appeals'

concern is that such a construction of Louisiana law would enable a plaintiff to abuse access to the courts by filing repetitive suits on the same subject, then the court apparently overlooked the fact that a federal court exercising its power under Fed.R.Civ.P. 41(b) has the right to dismiss an action for failure to prosecute with prejudice. Therefore, if a federal court in any given case believes that it is necessary to dismiss an action for failure to prosecute, and to preclude the action from being brought again, then that court can simply grant the dismissal with prejudice.

Since there exists no conflict with Fed.R.Civ.P. 41(b), the Erie doctrine requires that this court apply the definition of abandonment found in Louisiana Code of Civil Procedure Article

561 to the construction of Civil Code Article 3463 to avoid having the result of the litigation materially differ simply because the suit was brought in a federal court. Clearly, if the petitioner had filed the second complaint in a Louisiana state court, then the state court would have been obliged to apply Louisiana Code of Civil Procedure Article 561 in determining the meaning of abandonment for purposes of construing Civil Code Article 3463. Given that obligation, a state court would reject the respondent's claim that prescription was not interrupted by the first suit. The fact that the court of appeals' decision reaches a different result under circumstances when to have followed state law would not have impaired the effectiveness of either the Federal Rules of Civil Procedure or any other federal law or policy is at odds with the

twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws. Hanna v. Plumer, 380 U.S. 460, at p.468, 85 S.Ct. 234, at p. 1142 (1965). In explaining the roots of the Erie Doctrine, this Honorable Court in Hanna v. Plumer, supra, at p. 467, pp. 1141-1142, stated:

> "The Erie rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court. * * * The decision was also in part, a reaction to the practice of "forum-shopping" which had grown up in Swift v. Tyson."

The history of Louisiana Code of Civil Procedure Article 561 demonstrates that the term abandonment, as used in that provision, is intended to apply to the construction of Louisiana Civil Code

Article 3463. This history, outlined in detail in the case McCallon v. Travelers Insurance Company, 302 So.2d 676 (La.App. 3rd Cir. 1974), shows that the provisions of Louisiana Code of Civil Procedure Article 561 and Louisiana Civil Code Article 3463 were once combined into a single law, namely former Civil Code Article 3519, as amended by Act. No. 615 of 1954. Former Civil Code Article 3519 contained both the effect of abandonment on the accrual of prescription, as well as the definition of abandonment for purposes of applying that provision. When the State of Louisiana adopted a Code of Civil Procedure, the portion of former Civil Code Article 3519 which defined abandonment, was transferred to Louisiana Code of Civil Procedure Article 561. However, there is no legislative history

or jurisprudence which even remotely suggests that this transfer was intended to change the definition of abandonment under La. Civil Code Article 3463.

2. THE ERIE DOCTRINE, AND THE RULES OF DECISION ACT (28 U.S.C. 1652) PROHIBIT A FEDERAL COURT FROM EXPANDING THE SCOPE OF A STATE LIMITATION OF ACTION STATUTE BY ANALOGY WHEN THE SUPREME COURT OF THE STATE FORBIDS SUCH A CONSTRUCTION OF THE STATUTE

The court of appeals acknowledged that it was extending the application of La. Civil Code Article 3463 to the facts of this case by analogy. Furthermore, the court rejected the petitioner's contention that La. Civil Code Article 3463 should be construed narrowly to limit annulment of interruption of prescription to only the

conditions enumerated therein. When it did so, the court of appeals violated a rule of construction of prescription statutes recognized by well settled Louisiana jurisprudence. The Supreme Court of Louisiana has held that prescription is considered "stricti juris", and cannot be extended to analogous cases beyond the strict letter of the law. Consequently, the refusal of the court of appeal to adhere to that rule of construction violates the court's obligation under the Erie Doctrine and the Rules of Decision Act (28 U.S.C. 1652) to apply state law in the manner in which the highest court of Louisiana would have done under the circumstances.

In Duer v. Taylor v. Blanchard, Walker, O'Quin & Roberts, 354 So.2d 192, at p. 194 (La.1978), the Supreme Court of

Louisiana, in response to a certified question submitted by the United States Court of Appeals for the Fifth Circuit, made the following pronouncement governing the application and interpretation of Louisiana prescription statutes:

> "It is equally well settled that prescription is stricti juris and the statutes on the subject cannot be extended from one action to another, nor to analogous cases beyond the strict letter of the law." (emphasis supplied)

Even assuming, arguendo, there was some doubt about the meaning of "abandonment" as applied to La. Civil Code Article 3463, the court of appeal was obliged by Louisiana law to strictly construe the term against prescription and in favor of the obligation sought to be extinguished by it. The Supreme Court of Louisiana stated this principle in State ex rel Guste v. Simoni, Heck & Associates,

331 So.2d 478, at p.486 (La.1976) as follows:

> "If there were doubt, however, ambiguous prescription statutes must be strictly construed against prescription and in favor of the obligation sought to be extinguished by it."

Similarly, in Foster v. Breaux, 270 So.2d 526, at p. 529 (La.1972), the Supreme Court of Louisiana stated:

> "Under Louisiana jurisprudence, prescriptive statutes are strictly construed, and of two permissible constructions that is adopted which favors maintaining rather than barring the action."

In addition to the foregoing directives from the Supreme Court of Louisiana governing the construction of prescription statutes, the Louisiana Legislature has put the judiciary on notice that the courts are not authorized to extend prescription statutes beyond the strict letter of the law. This message is

set forth in La. Civil Code Article 3457 as follows: "There is no prescription other than that established by legislation." (emphasis supplied). Notice should be taken of the fact that the foregoing codal provision uses the term "legislation", and not "law". the use of the term "legislation" clearly suggests that the Louisiana Legislature is telling the judiciary that the establishment of prescription is strictly a legislative, and not judicial, function.

Considering the foregoing rules of construction for prescription states announced by both the Supreme Court of Louisiana and the Louisiana Legislature, the court of appeal in this case chose a path of statutory construction of La. Civil Code Article 3463 that clearly deviates from Louisiana law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the appropriate copies of this petition for writ of certiorari have been served by mail upon counsel for the respondent by depositing same in the U.S. mail, with first class postage prepaid, addressed to counsel for respondent at his post office address, on this ____ day of January, 1988.

KENNETH C. FONTE

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 86-3500

BERNETTA HILBUN,
Plaintiff-Appellant,

v.

DAVID J. GOLDBERG,
Defendant-Appellee.

Aug. 10, 1987

Appeal from the United States District Court for the Eastern District of Louisiana

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Before GARZA, RUBIN, and JONES, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

An auctioneer and onetime vice-president of an auction house appeals from a jury verdict of tortious conversion, claiming that under Louisiana law, which governs the action against him, the cause of action had prescribed before the suit was filed. We find that, when an earlier actions was dismissed under Fed.R.Civ.P. 41(b) for failure to prosecute it, the interruption of prescription effected by filing the action was annulled, so that prescription ran without interruption from the date of the occurrence on which the cause of action was based. We therefore reverse, holding that under Louisiana law the plaintiff's cause of action had prescribed at the time she filed the complaint in this suit.

In March 1984, Bernetta Hilbun's daughter, Janet Rosa, brought a station wagon load of antiques and collectibles to

Morton's Auction Exchange in New Orleans for sale at auction. At her request, David Goldberg, who was, at that time, a vice-president of an auctioneer at Morton's, visited Hilbun's home in Laurel, Mississippi, to evaluate other similar items for possible inclusion in the auction on a consignment basis. Many of these items were subsequently transported to New Orleans and sold by Morton's at auction in late March.

At trial, the jury found that Goldberg had orally agreed that reserve prices would be assigned to the articles offered for sale, and that they would not be sold if the bids did not reach those prices. Nevertheless, at the auction itself Goldberg sold all but one of the items for less than what Hilbun testified should have been the reserve price. In early

June, 1984, prior to expiration of the sixty banking-day period allowed in the auction contract for payment of the proceeds, Morton's filed for bankruptcy under Chapter 7. Consequently, Hilbun has received nothing from the sale.

In July, 1984, Hilbun filed a complaint against Goldberg personally in the United States District Court for the Eastern District of Louisiana. The complaint alleged a breach of contract for selling goods below the price specified and sought damages. Hilbun took no further action, and, on March 27, 1985, the district court dismissed the suit without prejudice for failure to prosecute under Fed.R.Civ.P. 41(b).

Although Hilbun contends that her suit was not prosecuted because she was unable to serve Goldberg with process, she did not move to vacate the order of dismissal.

Instead, on May 8, 1985, she filed a new complaint against Goldberg claiming damages for tortious conversion of personal property through misrepresentation. Before filing an answer, Goldberg moved to dismiss the complaint on the ground that on the fact of the complaint plaintiff's cause of action was prescribed under Article 3492 of the Louisiana Civil Code, which provides for liberative prescription of delictual actions after a period of one year.[1] The trial judge denied this motion with leave to re-urge it at the trial itself. The case was tried in April, 1986, and the jury entered

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1) La.Civ. Code Ann. art. 3492 (West Supp. 1987) provides: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained."

a verdict for Hilbun. On appeal, Goldberg argues that Hilbun's cause of action in tort had prescribed at the time she filed her complaint in the second suit, and that the facts as found do not constitute the tort of conversion.

Each of Hilbun's complaints was based on state causes of action, and Louisiana prescription law applies.[2] Under La. Civil Code Ann. Art. 3463, Hilbun's first complaint, in July 1984, interrupted the running of prescription for her cause of

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2.) See Guarantee Trust Co. v. York, 326 U.S.99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945); Abdul-Alim Amin v. Universal Life Ins. Co., 706 F.2d 638, 640 (5th Cir.1983).

action in contract.[3] We must decide what effect the dismissal of that action under Fed.R.Civ.P. 41(b) for failure to prosecute has on the viability of Hilbun's second complaint for tortious conversion.

Fed.R.Civ.P. 41(b) empowers the federal courts to dismiss, sua sponte, actions for failure to prosecute.[4] A federal court that dismisses without prejudice a suit arising from a federal statutory cause of action has not

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3.) La.Civ. Code Ann. art. 3463 (West Supp. 1987) provides:

> An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses, or fails to prosecute the suit at the trial.

4.) Link v. Wabash Railroad Company, 370 U.S. 626, 630, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962).

adjudicated the suit on its merits, and leaves the parties in the same legal position as if no suit had ever been filed.[5] Neither the Louisiana nor the federal courts have ruled on the precise question raised by our case, whether in a diversity-jurisdiction case that requires the application of Louisiana law the same principle applies. We are to decide this question as we believe the Louisiana courts would if they were to address it.[6] While we recognize that the Louisiana Supreme Court decided in Hebert v.

5.) See Taylor v. Bunge Corp., 775 F.2d 617, 619 (5th Cir 1985); Ford v. Sharp, 758 F.2d 1018, 1023-24 (5th Cir.1985); Owens v. Weingarten's, Inc., 442 F.Supp. 497, 498 (W.D.La. 1977).

6.) 419 So.2d 878, 880-81 (La.1982).

Cournoyer Oldsmobile-Cadillac GMC, Inc.,[7] that a plaintiff's voluntary dismissal of an action after the parties have been joined does not annul interruption of prescription, that decision found that the defendant, by failing to demand that the plaintiff's voluntary dismissal in open court on the eve of trial be entered with prejudice, had in effect waived the prescription defense.

Hilbun would have us decide that, since Louisiana courts lack the power to enter, sua sponte, involuntary dismissals for mere failure to prosecute, Article 3463 should be read narrowly to provide for annulment of interruption of

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7.) Powell, Inc. v. Abney, 669 F.2d 348, 349 (5th Cir.1982); Arceneaux v. Texaco, Inc., 623 F.2d 924, 926 (5th Cir.1980), cert. denied, 450 U.S. 928, 101 S.Ct. 1385, 67 L.Ed.2d 359 (1981).

prescription only under its enumerated conditions: "if the plaintiff abandons [after five years, under Louisiana Code of Civil Procedure Article 561], voluntarily dismisses, or fails to prosecute the suit at the trial."[8] If, however, Louisiana courts had the broad procedural power given federal courts, we believe that exercise of his power would lead to the same consequences as an abandonment under Article 3463: The legal result would be

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8.) Emphasis added. La.Code Civ.Proc.Ann. art. 561 (West Supp.1987) provides:

> A. An action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of five years.... This provision shall be operative without formal order, but on ex parte motion of any party or other interested person, the trial court shall enter a formal order of dismissal as of the date of its abandonment.

the same as if no suit had ever been filed. There would be no interruption of prescription, and no adjudication on the merits. The fact that, under Article 561, an order of dismissal may be entered only upon party application and only after the passage of five years does not defeat the analogy; federal courts are priviledged to establish their own procedural rules for control of their dockets for actions heard in diversity.9 The plaintiff who wishes to show cause why an action should not be dismissed for failure to prosecute may appear at the call docket to do so; afterwards, he can move to vacate the order of dismissal. According to the record, Hilbun did neither.

9.) See Wright v. Lumbermen's Mutual Casualty Company, 242 F.2d 1 (5th Cir.), cert. denied, 354 U.S. 939, 77 S.Ct. 1397, 1 L.Ed.2d 1536 (1957).

[1] Hilbun urges that, by filing a proof of claim in bankruptcy against Morton's Auction Exchange, she interrupted prescription against Goldberg on the basis that he was a solidary obligor. the premise is incorrect: Goldberg was not a solidary obligor for the claim filed in bankruptcy. That proof of claim was for the net proceeds of the sale of her chattels at auction, a different obligation from that claimed of Goldberg. In addition, under Louisiana law, it is not sufficient to claim solidary obligation; it must be proved.[10]

[2] Goldberg did not waive his right to assert the affirmative defense of prescription by his failure to raise it at

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10.) Cox v. Shreveport Packing Co., 213 La.53, 34 So.2d 373 (1948).

the trial itself. The facts establishing that Hilbun's cause of action had prescribed were apparent on the face of the complaint itself, and there was no dispute of fact about when the cause of action arose. Consequently, Goldberg could raise the defense of prescription through a motion to dismiss, filed prior to his answer. Such a motion is to be treated as a motion for summary judgment.[11] Questions of law on the interruption of prescription should have been addressed at the hearing on the motion for dismissal or for summary

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11.) London v. Coopers & Lybrand, 644 F.2d 811, 816, (9th Cir.1981); Jablon v. Dean Witter, 614 F.2d 677, 682 (9th Cir.1980); 2A Moore's Federal Practice 12.10 (1979 ed.); 5 Wright & Miller Federal Practice and Procedure Sec. 1357.

judgment; they were not for the jury to decide. The denial of the motion to dismiss on grounds of prescription was an interlocutory ruling, not appealable before final judgment. Hence that defense is properly before this court on appeal.

[3] Even if the prior contract-based suit would have interrupted prescription on the present conversion claim, had it not been dismissed, its dismissal erases its effect, and Hilbun's claim is, therefore, prescribed.

For these reasons, we REVERSE, and enter judgment for the defendant.

APPENDIX B
28 U.S.C. 1652
(RULES OF DECISION ACT)

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c.646, 62 Stat. 944.

APPENDIX C
FED.R.CIV.P.41(b)

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against, the court shall make findings as provided

in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

APPENDIX D
LSA - C.C.ART. 3463

An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process withing the prescriptive period continues as long as the suit is pending. Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses, or fails to prosecute the suit at the trial.

APPENDIX E
LSA - C.C.P. ART. 561

A. An action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of five years, unless it is a succession proceeding:

(1) Which has been opened;

(2) In which an administrator or executor has been appointed; or

(3) In which a testament has been probated.

This provision shall be operative without formal order, but on ex parte motion of any party or other interested person, the trial court shall enter a formal order of dismissal as of the date of its abandonment.

B. An appeal is abandoned when the parties fail to take any steop in its

prosecution or disposition for the period provided in the rules of the appellate court.

APPENDIX F
LSA - C.C.ART. 3457

There is no prescription other than that established by legislation.